Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–4 OF 2011(Q) AND 01–5 OF 2011 (Q)
ZAKI AZMI CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND RAUS SHARIFF FCJ
8 SEPTEMBER 2011

Civil Procedure — Appeal — Summary judgment — Extinguishment of native customary rights — Whether case suitable for summary disposal — Whether case to be remitted for retrial

Constitutional Law — Right to property — Aboriginal peoples' rights over land — Extinguishment of native customary rights — Whether for public purpose — Whether government acted in contravention of art 13(2) of the Federal Constitution — Whether appellants sufficiently compensated

There were two appeals before the court ie Civil Appeal No 01–4 of 2011(Q) ('Bato Bagi') and Civil Appeal No 01–5 of 2011(Q) ('Jalang'). Bato sued on behalf of themselves and behalf of all other residents who have native customary rights ('NCR') over lands along Batang Balui and its tributaries, Belaga District Kapit Division Sarawak for a declaration that the extinguishment of their NCR, for the Bakun hydroelectric project, was void because it violated Bato's fundamental rights under arts 5, 8, 13 and 153 of the Federal Constitution ('the Constitution') and art 39(1) and (2) of the Constitution of the State of Sarawak ('the SC'). In essence Bato sought to declare s 5(3) and 5(4) of the Sarawak Land Code ('the SLC') ('the impugned sections') as unconstitutional and that the extinguishment of their NCR made thereunder was invalid and void. Alternatively they prayed for adequate compensation and damages. Similarly, Jalang and their families had their lands in Ulu Batang Tatau, Tatau, Bintulu Division, Sarawak, extinguished for a pulpwood mill, which to date, has not been constructed. Jalang sought similar relief as Bato in that the impugned sections are unconstitutional as it violated arts 5, 8, 13 and 153 of the Constitution and art 39 of the SC and that the extinguishment of their NCR was void. In the High Court, the trial judge decided that the case was suitable for disposal under O 14A without the need for the matter to be ventilated through full trial. The judge found in favour of the government in that the impugned sections were not unconstitutional and the extinguishment of the NCR was done in a proper and valid manner. This decision was affirmed by the Court of Appeal which held that the NCR can be extinguished in accordance with the law and with the payment of

compensation. The appellants sought the cases to be sent back for retrial as they are not suitable to be disposed of summarily. A

Held, dismissing the appeals with no order as to costs:

(1) (per **Zaki Azmi Chief Justice** and **Richard Malanjum CJ (Sabah and Sarawak)**) Many of the natives have accepted the compensation by the government. If Bato Bagi was not happy with the compensation offered, they should have asked for it to be arbitrated during which they could have raised all the matters affecting their livelihood. Further, as it had been almost over ten years lapsed since the rights over the land was extinguished, sending the case back for trial would be unnecessary waste of money and time. At the same time it would render the findings of the High Court purely academic (see paras 11 & 23). B C

(2) (per **Richard Malanjum CJ (Sabah and Sarawak)**) There was no requirement of public purpose as a reason for the exercise of the power in the impugned sections. Thus the reference by the learned High Court judge of public purpose was misplaced. Further s 15A of the SLC cannot be read into the impugned sections as the section is limited to instances of post extinguishment ie lands which have been 'surrendered, reverted or resumed' to the government. In the circumstances the learned High Court judge was wrong to 'import' the provisions of s 15A to assert that the NCR could only be extinguished for a public purpose, which was not a prerequisite for extinguishment (see paras 62 & 64). D E

(3) (per **Richard Malanjum CJ (Sabah and Sarawak)**) In considering the quantum of compensation, all the relevant factors, such as, the natives belonged to the land and are part and parcel of it instead of being the owners, their total dependency on the land and its surroundings and how their daily livelihood depended on the land, must be taken into account. Most importantly the amount of compensation must be reflective of the long term effect which the extinguishment was going to inflict upon the natives. Hence, the compensation should not be merely adequate but it should also be sufficient and reasonable based on a long term scale (see paras 123–124). F G H

(4) (per **Raus Sharif FCJ**) Having agreed on the mode of trial, it is not proper for the appellants in *Jalang* to ask for a retrial to enable oral evidence to be recorded. To allow such retrial was like giving the appellants a second chance and would set a dangerous precedent for future cases. Whereas in *Bato*, the constitutional issues were neither raised as a ground in the memorandum of appeal nor canvassed and argued before the Court of Appeal. Thus, the Court of Appeal could not be faulted or blamed for not deciding on the constitutional issues. The appellants could not use the absence of the Court of Appeal's decision on I

A the constitutional issues, as a ground to have the case be remitted to the High Court for retrial (see paras 148 & 157).

(5) (per **Raus Sharif FCJ**) There was no provision for pre-extinguishment hearing. The SLC only provides for hearing in respect of quantum of
B compensation payable and did not impose obligation to inform the appellants of the extinguishment or to invite them to make representation to the government. Therefore the government could not be said to have acted in contravention of art 13(2) of the Constitution (see para 172).

C (6) (per **Raus Sharif FCJ**) The Minister's discretion in issuing the direction to extinguish the NCR was not absolute. The extinguishment of the NCR must be for public purpose. Any extinguishment which was not for public purpose was open for challenge and may be struck down by the court on the ground of mala fide or abuse of power. However, on the
D facts, the appellants had failed to adduce evidence of bad faith or abuse of power (see paras 178–179).

(7) (per **Raus Sharif FCJ**) International treaties do not form part of Malaysian law and thus the court should not use 'international norms'
E embodied in the UNDRIP to interpret arts 5 and 13 of the FC be used as a guide to interpret the Constitution (see para 180).

[Bahasa Malaysia summary

Terdapat dua rayuan di hadapan mahkamah iaitu Rayuan Sivil No 01–4 Tahun
F 2011(Q) ('Bato') dan Rayuan Sivil No 01–5 Tahun 2011(Q) ('Jalang'). Bato menyaman bagi pihak mereka dan kesemua penduduk yang mempunyai hak adat anak negeri ('HAAN') ke atas tanah di sepanjang Batang Balui dan sekitarnya, Daerah Belaga, Bahagian Kapit Sarawak untuk deklarasi bahawa pemansuhan HAAN mereka untuk projek hidroelektrik Bakun, adalah batal
G kerana ia mencabuli hak asasi Bato di bawah perkara-perkara 5, 8, 13 dan 153 Perlembagaan Persekutuan ('Perlembagaan') dan perkara 39(1) dan (2) Perlembagaan Negeri Sarawak ('PS'). Pada asasnya Bato memohon untuk mengisytiharkan s 5(3) dan 5(4) Kanun Tanah Sarawak ('KTS') ('seksyen yang dipersoalkan') sebagai tidak berperlembagaan dan bahawa pemansuhan
H HAAN mereka yang dibuat di bawahnya adalah batal dan tidak sah. Secara alternatif, mereka memohon untuk pampasan yang sewajarnya dan ganti rugi. Seperti itu juga, tanah Jalang dan keluarganya di Ulu Batang Tatau, Tatau, Bahagian Bintulu, Sarawak, dimansuhkan untuk kilang kayu pulpa, yang sehingga kini, masih belum dibina. Jalang memohon relief yang serupa dengan
I Bato di mana seksyen yang dipersoalkan adalah tidak berperlembagaan kerana ia mencabuli perkara-perkara 5, 8, 13 dan 153 Perlembagaan dan perkara 39 PS dan bahawa pemansuhan HAAN mereka adalah batal. Di Mahkamah Tinggi, hakim bicara memutuskan bahawa kes tersebut adalah sesuai untuk diputuskan di bawah A 14A tanpa perlu perkara tersebut dibicarakan secara

penuh. Hakim memutuskan memihak kepada kerajaan di mana seksyen yang dipersoalkan adalah berperlembagaan dan pemansuhan HAAN dibuat secara yang wajar dan sah. Keputusan ini disahkan oleh Mahkamah Rayuan yang memutuskan bahawa HAAN boleh dimansuhkan menurut undang-undang dan dengan bayaran pampasan. Perayu-perayu memohon kes ini dihantar semula untuk ulang bicara kerana ia tidak sesuai untuk diputuskan secara terus (*summarily*).

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) (oleh **Zaki Azmi Ketua Hakim Negara dan Richard Malanjum HB (Sabah dan Sarawak)**) Ramai daripada orang asal telah menerima pampasan oleh kerajaan. Jika Bato Bagi tidak puas hati dengan pampasan yang ditawarkan, mereka sepatutnya meminta ia ditimbangtara di mana mereka boleh membangkitkan kesemua perkara yang membabitkan kehidupan mereka. Selanjutnya, oleh kerana ia telah berlaku lebih sepuluh tahun lepas sejak hak terhadap tanah tersebut dimansuhkan, menghantar semula kes tersebut untuk dibicara akan menyebabkan pembaziran wang dan masa. Pada masa yang sama ia akan menjadikan penemuan Mahkamah Tinggi akademik semata-mata (lihat perenggan 11 & 23).

(2) (oleh **Richard Malanjum HB (Sabah dan Sarawak)**) Tidak ada keperluan untuk tujuan awam sebagai alasan untuk melaksanakan kuasa di dalam seksyen yang dipersoalkan. Oleh demikian, rujukan oleh hakim Mahkamah Tinggi yang bijaksana tentang tujuan awam adalah salah tanggap. Selanjutnya, s 15A KTS tidak boleh dibaca bersama seksyen yang dipersoalkan kerana seksyen tersebut terhad kepada keadaan selepas pemansuhan iaitu tanah-tanah yang telah pun 'surrendered, reverted or resumed' kepada kerajaan. Dalam keadaan ini hakim Mahkamah Tinggi yang bijaksana telah terkhilaf 'mengimport' peruntukan s 15A untuk menegaskan bahawa HAAN hanya boleh dimansuhkan untuk tujuan awam, yang bukan prasyarat untuk pemansuhan (lihat perenggan 62 & 64).

(3) (oleh **Richard Malanjum HB (Sabah dan Sarawak)**) Dalam menentukan kuantum pampasan, kesemua faktor-faktor yang relevan, seperti, orang asal berasal dari tanah tersebut dan adalah darah daging mereka dan bukan hanya pemiliknya, keseluruhan kebergantungan mereka terhadap tanah dan keadaan sekelilingnya dan bagaimana kehidupan seharian mereka bergantung kepada tanah tersebut, mesti diambil kira. Lebih penting lagi jumlah pampasan mesti memberikan kesan jangka panjang akibat daripada pemansuhan tersebut kepada orang-orang asal. Maka, pampasan tersebut bukan semata-mata mencukupi tetapi ia semestinya mencukupi dan munasabah berasaskan kepada skala jangka panjang (lihat perenggan 123–124).

(4) (oleh **Raus Sharif HMP**) Setelah bersetuju dengan cara perbicaraan, tidak wajar bagi perayu-perayu di dalam kes *Jalang* meminta untuk perbicaraan semula untuk membolehkan keterangan lisan direkodkan. Membenarkan perbicaraan semula seperti itu akan memberikan perayu-perayu peluang kedua dan akan mewujudkan duluan yang berbahaya bagi kes-kes di masa akan datang. Manakala di dalam *Bato*, isu perlembagaan tidak dibangkitkan sebagai alasan di dalam memorandum rayuan dan tidak dikemukakan dan dihujah di hadapan Mahkamah Rayuan. Oleh itu, Mahkamah Rayuan tidak boleh dipersalahkan atau dipertanggungjawabkan kerana tidak memutuskan perlembagaan itu. Perayu-perayu tidak boleh menggunakan ketiadaan keputusan Mahkamah Rayuan atas isu perlembagaan, sebagai alasan untuk mengembalikan kes ke Mahkamah Tinggi untuk diulang bicara (lihat perenggan 148 & 157).

(5) (oleh **Raus Sharif HMP**) Tidak ada peruntukan untuk perbicaraan pra-pemansuhan. KTS hanya memperuntukkan untuk perbicaraan berkaitan dengan kuantum pampasan yang boleh dibayar dan tidak meletakkan obligasi untuk memberitahu kepada plaintif-plaintif tentang pemansuhan atau mengundang mereka untuk membuat rujukan kepada kerajaan, Oleh itu kerajaan tidak boleh dikatakan bertindak bertentangan perkara 13(2) Perlembagaan (lihat perenggan 172).

(6) (oleh **Raus Sharif HMP**) Budi bicara Menteri dalam mengeluarkan arahan untuk pemansuhan HAAN bukanlah mutlak. Pemansuhan HAAN semestinya untuk tujuan awam. Mana-mana pemansuhan yang bukan untuk tujuan awam adalah boleh dicabar dan boleh dibatalkan oleh mahkamah atas alasan mala fide atau penyalahgunaan kuasa. Walau bagaimanapun, di atas fakta, perayu-perayu telah gagal mengemukakan keterangan niat jahat atau penyalahgunaan kuasa (lihat perenggan 178–179).

(7) (oleh **Raus Sharif HMP**) Perjanjian antarabangsa (*international treaties*) tidak membentuk sebahagian undang-undang dan oleh demikian mahkamah tidak patut menggunakan 'international norm' yang terangkum di dalam UNDRIP untuk mentafsirkan perkara-perkara 5 dan 13 Perlembagaan untuk digunakan sebagai panduan untuk mentafsirkan PP (lihat perenggan 180).]

Notes

For cases on aboriginal people's rights over land, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2691–2692.

For cases on summary judgment, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1665–1672.

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, HC (refd)

Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285, FC (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Bato Bagi & Ors v Government of the State of Sarawak & Anor [2011] 6 CLJ 387, CA (refd)
Bato Bagi & Ors v Government of the State of Sarawak [2008] 5 MLJ 547; [2008] 6 CLJ 867, HC (refd)
Delgamuukw v British Columbia [1997] 3 SCR 1010 (refd)
Educational Company of Ireland Ltd v Fitzpatrick (No 2) (1961) IR 345 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)
Jalang ak Paran & Anor v Government of the State of Sarawak & Anor [2011] 3 MLJ 13; [2011] 3 CLJ 469, CA (refd)
Jalang anak Paran & Ors v Government of the State of Sarawak & Anor [2007] 1 MLJ 412, HC (refd)
Kartinyeri v The Commonwealth [1998] HCA 22 (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)
Ladd v Marshall [1954] 3 All ER 745, CA (refd)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337, FC (refd)
Merdeka University Bhd v Government of Malaysia [1981] 2 MLJ 356 (refd)
Mohd Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449, FC (refd)
Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383, HC (folld)
O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124, HL (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)
Plaintiff M70/ 2011 v Minister for Immigration and Citizenship & Anor [2011] HCA 32 (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204; [1982] CLJ (Rep) 314, FC (refd)
Shaharuddin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor [2005] 2 MLJ 555; [2004] 4 CLJ 775, HC (folld)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
State of Bihor @ Ors v Bihar Distillery Ltd AIR 1997 SC 1511 (refd)
Superintendent of Lands & Surveys, Bintulu v Nor anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)
Superintendent of Lands & Surveys, Miri Division v Madeli Salleh [2007] 6 CLJ 509, FC (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)

Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (refd)

Vedprakash v The State 1987 AIR Gujarat 253 (refd)

Verschures Creameries, Limited v Hull and Netherlands Steampship Company, Limited [1921] 2 KB 608, CA (refd)

Legislation referred to

Law of the Constituition of Sarawak art 39, 39(1), (2)
Courts of Judicature Act 1964 s 96(a)
Federal Constitution arts 5, 8, 13, 13(2), 153
Land Aquisition Act 1960
National Land Code
Rules of the High Court 1980 O 14A, O 53
Sarawak Land Code ss 5(3), 3(b), (4), (5), 15(1), 15A

Sulaiman Abdullah (Baru Bian with him) (Baru Bian) for the appellants.

JC Fong (Marjanah Adenan with him) (State Attorney General of Sarawak, Attorney General's Chambers, Sarawak) for the respondent.

Zaki Azmi Chief Justice:

[1] I have had the privilege of reading the judgments of my learned brothers Richard Malanjum CJSS and Raus Sharif FCJ. I shall not be repeating the facts and issues discussed by them in their respective judgments. I however like to add my opinion and express my decision in this appeal. Detailed facts can be found in their judgments as well as reported judgments in the Court of Appeal, *Bato Bagi & Ors v Government of the State of Sarawak* [2011] 6 CLJ 387. *Jalang Paran & Anor v Government of the State of Sarawak & Anor* [2011] 3 MLJ 13; [2011] 3 CLJ 469 and in the High Court [2008] 5 MLJ 547; [2008] 6 CLJ 867 (for *Bato Bagi*) and [2007] 1 MLJ 412 (for *Jalang*). For my judgment, I am only reciting facts material to my grounds.

[2] Bato Bagi and six other plaintiffs in the Appeal No 01–4 of 2011(Q) are natives of Sarawak enjoying native customary rights over the lands which were needed for the Bakun dam. Their rights were extinguished by the State Government of Sarawak ('the government').

[3] Jalang ak Paran and Kampung ak Ameh in the Appeal No 01–5 of 2011(Q) are also natives enjoying customary rights over another land which was required for pulpwood mill. Their native customary rights over the land were also extinguished.

[4] They now claim that the extinguishment violated their rights under arts 5

and 13 of the Federal Constitution. Leave was granted on the question of whether the extinguishment contravenes those articles and therefore void. A

[5] Both these appeals were heard together although factually there are some variances. While Bato Bagi and his friends' lands is now flooded for the Bakun dam, Jalang and his friends' lands is until now not being utilised for the pulpwood mill. Another major distinction is that while Bato Bagi did not agree to facts, issues and documents, Jalang consented that his actions be dealt with by way of parties agreeing to facts, issues, bundle of documents and written submissions. B C

[6] Their cases at the High Court were decided pursuant to O 14A of the Rules of the High Court 1980. Appeals to the Court of Appeal were dismissed.

[7] Bato Bagi while seeking for a declaration that ss 5(3) and (4) of the Sarawak Land Code ('Code') are unconstitutional and therefore the extinguishment of their customary rights was invalid and void, pleaded for in the alternative adequate compensation and damages. D

[8] Both Bato Bagi and Jalang urge this court to remit the case back for a full trial with witnesses and evidence. They contend that it is necessary for the court to fully understand the facts before it can make a decision as to the unconstitutionality of the provisions. They say that the court must give them an opportunity to raise issues relating to, eg their customs including their burial grounds, their ways of livelihood etc. They contend there should have been 'pre-acquisition' or consultation hearing before extinguishment. They also allege that the survey was not properly done. They need these facts to prove their claim and the quantum of damages. E F

[9] During the course of argument, the appellants' counsel admitted that the government must be empowered to extinguish the rights over this land for public purposes and development. The High Court judges held that the acquisition were in fact for public purpose. David Wong J in *Jalang* held: G

> So the only reason for the extinguishment must be for the benefit of the state and public purpose. It is not disputed by counsel on both sides that there is no specific provision requiring the first defendant to disclose the purpose of extinguishment which in my view is understandable as there can be only one purpose for extinguishment which is public purpose. Be that as it may, one can and should imply from the above sections that the Minister is under a duty to disclose the reason of extinguishment and failure to do so would be a breach of a statutory duty on the part of the Minister. H I

[10] The appellants' counsel gravamen is that the government should have

consulted the natives so that the natives would be able to air their views, eg instead of extinguishing their rights over a certain area the government may, after hearing their views decide to acquire another area.

[11] Speaking about compensation many of the natives who were with Bato Bagi have accepted the compensation by the government. If Bato Bagi is not happy with the compensation offered to them, they should have asked for it to be arbitrated (see s 5(4) of the Code). In my opinion during that arbitration they could have raised all the issues regarding eg loss of their farms, burial grounds and other matters affecting their livelihood. There is no need for this case to be sent back for trial. To me that would be unnecessary waste of money and time. As it is almost over ten years have lapsed since 1997 of their rights over the land was extinguished vide the Land Direction (Extinguishment of Native Customary Rights) (Kawasan Kebanjiran Bakun) (No 26) 1997 ('Bakun NCR Extinguishment Direction'). Their suit was filed in 2000. If the case is resend for full trial, the findings by the High Court would be purely academic. Bato Bagi has accepted the compensation without referring it to arbitration. How could he now come before us for us to review the compensation or the extinguishment of the natives' rights itself?

[12] Section 5(4) of the Code provides for the natives to challenge the Minister's decision regarding extinguishment of customary rights under s 5(3).

[13] The appellants also submitted that the guidelines for awarding compensation are not provided for by the law as it is done under the Peninsular Malaysia Land Acquisition Act 1960. But then these are issues for the government to decide not the court. To me in the absence of any rules or guidelines the arbitrator can take any matter into consideration to determine the amount of compensation. The considerations that the arbitrator could take would be wider than if the law had provided the guidelines. If either party is unhappy they can always go for judicial review (see O 53 of the Rules of the High Court 1980). If it can be shown that the High Court had erred then they could take the matter higher. In any case, the case of *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 has already laid down the compensation payable to the natives. The High Court expressed the following views, which views were upheld by the Court of Appeal:

> As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

[14] The issue of compensation for loss of livelihood is now well established. A

[15] Now comes to Jalang. Jalang has accepted compensation without prejudice to referring it to arbitration. He can seek for arbitration on the amount and as I said above the arbitrator can be persuaded to take every matter and issues into consideration towards arriving at a fair conclusion. B

[16] Jalang's land over which the natives' rights have been extinguished was for the pulpwood mill. We are told that the mill was never constructed. On this issue the natives may wish to challenge the extinguishment on grounds of unconstitutionality as has been done in respect of lands purportedly acquired under the Land Acquisition Act 1960. It is not for me to say here whether they will be successful. C

[17] The question posed to this court is still pending. The following question: D

> Whether s 5(3) and (4) of the Sarawak Land Code relating to the extinguishment of native customary rights are ultra vires art 5 of the Federal Constitution read with art 13 of the Federal Constitution.

E

[18] This question is perhaps still valid in so far as Jalang is concerned because he can ask to return to his land since it is still vacant. It serves no purpose to Bato Bagi since his lands are already flooded. It is well established principles that a court does not make an order in futility. F

[19] On the question of pre-acquisition hearing, it would be a good practice to provide for such a hearing. But it is not for the court to make such an order. It is left to the authorities to do so, particularly in matters relating to native customary rights lands. As the matter of law I am of the opinion that this court should not disturb the principles set out in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204; [1982] CLJ (Rep) 314 ie that if the law does not provide for a pre-acquisition hearing then the claimant cannot seek for such right. It is not ultra vires the Constitution. The Court of Appeal held: G H

> In the light of the principles we have discussed we cannot but conclude that art 13(1) of the Constitution in no way vitiates the provisions of the Act in this regard.

I

[20] The Federal Constitution mandates that compensation be paid for any deprivation of property. I do not deny that property means more than just physical property but includes livelihood (see *Adong bin Kuwau*). But then this does not mean that it is ultra vires the Constitution to deprive a person of his

property including perhaps his livelihood. The victim can only demand for compensation for the loss of his livelihood resulting from any deprivation (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996]1 MLJ 261; [1996] 2 CLJ 771). In other words if a person is deprived from earning a living without just cause he must be compensated for that deprivation.

[21] As I had said earlier Bato Bagi's land is now inundated for the Bakun dam. Bato Bagi cannot return to his lands now. In fact they are occupying another area, not the one that they were allotted. If they cannot get back the land because it is inundated, the only alternative is for them to be paid adequate compensation.

[22] Compensation is clearly provided for by s 5(3) of the Code. Of course the procedure provided by that subsection must be complied with.

[23] As far as s 5(3) and (4) of the Code are concerned, other issues such as failure to provide proper notice of extinguishment of such rights were not pleaded and therefore is unfair to the other party. To allow the case to revert for full trial, particularly in the case of *Jalang* would be giving him a second bite at the cherry. Lawyers acting for their clients cannot be excused for their inefficiencies. To allow the appellants to reopen the issues on the facts of this case would open the pandora's box, giving opportunity to every party who has not pleaded his case properly to ask the appellate court for a retrial on new issues. Even to allow a party to adduce further evidence at appeal is limited (see *Ladd v Marshall* [1954] 3 All ER 745, *Mohd Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449).

[24] By the way the appellants also challenged that the Code refers only to 'compensation' and not adequate compensation as provided for by the Federal Constitution. I cannot distinguish the intention of the two provisions. To me compensation must mean adequate, fair or sufficient compensation. In any case the word adequate must be read into the Sarawak Land Code provision.

[25] As regard the invocation of UNDRIP, it must still be read in the context of our Constitution (see *Mohd Ezam bin Mohd Noor v Ketua Polis Negara, Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356, *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1).

[26] In my opinion there seems to possibly be other grounds for challenging the unconstitutionality of s 5(3) and (4) of the Code but unfortunately, as mentioned by my learned brother Chief Judge of Sabah and Sarawak, these were not raised or properly canvassed before us. A lengthy part of the submission was for the case to be reverted to the High Court for a full trial, which for reasons mentioned above, I do not find it proper to do so. I will

therefore have to decide the question based on the arguments put before us. And based on those arguments and after having read the grounds of both my learned brothers, I would associate myself with the Chief Judge of Sabah and Sarawak and find I do not need to answer the question.

[27] Based on the foregoing reasoning I hereby dismiss the appeal and uphold the orders of the courts below. In view of the circumstances of this appeal, we have decided not to make any order for cost.

Richard Malanjum CJ (Sabah and Sarawak):

INTRODUCTION

[28] The two appeals, namely *Bato Bagi & 6 Ors v Kerajaan Negeri Sarawak* (No 01–4 of 2011(Q)), and *Jalang ak Paran & Ors v Kerajaan Negeri Sarawak & Anor* (No 01–5 of 2011(Q)), were heard together as they involved the same question of law though they began as entirely separate actions before the High Court. Further, the parties agreed to this approach and I do not think there is any prejudice caused.

[29] As the appeals were heard together, I therefore propose to give my grounds under one judgment. Of course, wherever necessary, I shall make separate and specific reference to a particular appeal.

[30] For clarity and convenience, the respective appellants in these appeals were plaintiffs and the respondents were defendants before two different learned High Court judges in two entirely separate actions. Further, in this judgment, I will refer to the first appeal as the '*Bato*'s case' or '*Bato*' where the context requires and the second appeal as the '*Jalang*'s case' or '*Jalang*' where the context may require. Otherwise, the term 'appellants' in this judgment refers to both the appellants in these two appeals.

[31] Failing to succeed before the High Court, *Bato and Jalang* appealed to the Court of Appeal. They were also unsuccessful. It is to be noted that the Court of Appeal basically focused its decision on the applicability of O 14A. The constitutionality question was hardly discussed save for an expression on its agreement with the finding of the learned High Court judge. The Court of Appeal deemed it unnecessary since it was not neither covered in the memorandum of appeal nor argued. Thus, not much assistance can be derived from the decision on the issue. Dissatisfied, they are now appealing to this court.

[32] Leave was granted on 1 March 2011 by this court on one question:

A Whether ss 5(3) and (4) of the Sarawak Land Code relating to the extinguishment of native customary rights are ultra vires art 5 of the Federal Constitution read with art 13 of the Federal Constitution.

B **[33]** In addition, the parties were also given liberty to raise issues relating to pre-acquisition hearing and the type of compensation to be awarded.

[34] After hearing the parties relating to the appeals proper on 28 April 2011, 16 June 2011, and 12 August 2011, this court adjourned for C deliberation. I now give my decision together with my reasons.

PRELIMINARY ISSUES

[35] First, it is my considered view that the leave question posed cannot be D answered in vacuum without paying due consideration on the facts which caused the commencement of the suit. Hence, there is a need to elicit and to consider the facts and circumstances surrounding both appeals.

[36] Second, at the outset of the hearing learned counsel for the respondents E raised a preliminary objection ('PO') relating to the approach taken by the appellants before this court. It was submitted that as the matters were never pleaded and raised in the courts below, the appellants should not be allowed to raise them in these appeals. Moreover, the leave question had not been framed with the contemplation of such issues, and in any event, those matters were not F decided by the High Court and the Court of Appeal. Reliance was placed on s 96(a) of the Courts of Judicature Act 1964 and the case of *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25; [2011] 1 CLJ 51.

G **[37]** This court indicated to the respondents that it would consider the PO when it deliberates over its decision. I have attached due consideration to the PO and I reject it. My answer is simple. In order to prevent any miscarriage of justice, this court is entitled to allow an appellant to raise matters outside of the grounds upon which leave has been granted. In *Menteri Sumber Manusia v* H *Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 Edgar Joseph Jr FCJ said this at p 354:

> Clearly, therefore, having regard to these provisions, *the Federal Court has the power and therefore the discretion to permit an appellant to argue a ground which falls outside* I *the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice*. (Emphasis added.)

[38] Having said that, I hasten to add that this court should nevertheless prevent a litigant from raising matters which were not raised in the courts

below in clear cut cases, which is the general rule. If however, it can be shown that a serious miscarriage of justice had occurred as a result of the approach adopted at the courts below this court should always be at liberty to intervene.

[39] The foregoing view is not inconsistent with the authority of *Terengganu Forest* where it is said that '… once leave is granted on any one or more grounds discussed in this judgment this court can of course hear any allegation of injustice'.

[40] I now proceed to deal with the surrounding circumstances and background of both these appeals.

[41] For the *Bato*'s case, it is beyond doubt that the matter proceeded upon application by the respondents under the summary procedure of O 14A of the Rules of the High Court 1980 ('O 14A'). The learned High Court judge was of the view that the matter at hand was suitable to be disposed of in such a manner and found in favour of the respondents. This approach was upheld by the Court of Appeal. It was the approach taken by the learned High Court judge in the disposal of the matter which became the focal complaint of Bato before the Court of Appeal and before this court as well. Obviously Bato want their full day in court. As such, in this judgment, that issue will be in the forefront of my mind.

[42] However, for *Jalang*'s case, the parties agreed that the matter should proceed without calling oral evidence. Hence, the matter proceeded by relying on the agreed facts, agreed issues and bundle of documents prepared by the parties and based on submissions by the respective parties.

[43] I pause to note that although in *Jalang*'s case the High Court did not proceed on the basis of O 14A, it is clear that the approach adopted by the court was premised on a somewhat similar fashion. In the final analysis in both *Bato*'s case and *Jalang*'s case there was no evidence recorded viva-voce vide an ordinary course of full trial. The only material difference is that it was strenuously contested in the former while consented to in the latter. As in *Bato*'s case the basic complaint of Jalang before the Court of Appeal and before this court is also on the approach adopted by the learned High Court judge despite the fact that at the commencement of the proceeding all parties agreed to proceed without the need to call witnesses.

BATO'S CASE

[44] Bato sued on behalf of themselves and on behalf of all other residents of Uma Balui Ukap at Batu Kalo, Uma Lesong at Batu Keling, Uma Bakah at Long Bulan, Rumah Kulit at Long Jawe and Rumah Ukit at Long Ayak, all of

Ulu Balui, Belaga District Kapit Division Sarawak as at 23 June 1997 who have native customary rights over lands along Batang Balui and its tributaries, Belaga District Kapit Division Sarawak for a declaration that the extinguishment of their native customary rights vide the Land Direction (Extinguishment of Native Customary Rights) (Kawasan Kebanjiran Bakun) (No 26) 1997 ('Bakun NCR Extinguishment Direction') was void because it violated Bato's fundamental rights under arts 5, 8, 13, and 153 of the Federal Constitution ('FC') and arts 39(1) and 39(2) of the Constitution of the State of Sarawak ('SC').

[45] In short, Bato sought to declare s 5(3) and (4) of the Sarawak Land Code ('impugned sections') as unconstitutional, and that the extinguishment of their native customary rights made thereunder was invalid and void. Alternatively, they prayed for adequate compensation and damages.

[46] The impugned sections read:

> (3)
>
> (a) Any native customary rights may be extinguished by direction issued by the Minister which shall be —
>
> (i) published in the Gazette and one newspaper circulating in Sarawak; and
>
> (ii) exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished is situate, and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government:
>
> Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.
>
> (b) Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the Superintendent, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the Minister under paragraph (a), provided that the period so stipulated shall not be less than sixty days from the date of publication or exhibition thereof.
>
> (c) No claim for compensation for the extinguishment of native customary rights shall be entertained by the Superintendent unless such claim is submitted within the period stipulated in paragraph (b).

(4) (a) Any person who is dissatisfied with any decision made by the Superintendent under subsection (3) on the ground that —

(i) his claim to native customary rights has been rejected or not recognised by the Superintendent;

(ii) the allocation of land over which such rights are to be exercised, is inadequate or inequitable; or

(iii) the amount or apportionment of compensation is inadequate, unfair or unreasonable,

may within twenty-one days from the date of receipt of the decision of the Superintendent, by notice in writing addressed to the Superintendent, require the matter to be referred to arbitration in accordance with section 212.

(b) Upon receipt of the notice of arbitration, the Superintendent shall direct that any compensation payable to the person who desires to have his claim or matter referred to arbitration, to be deposited in the High Court, pending the outcome of such arbitration proceedings.

[47] It is not contradicted that till today Bato or at least most of them still live along the lands of Batang Balui and refused to relocate to the Sg Asap Resettlement Site.

[48] According to facts averred in the High Court and raised before this court in submission, it may be summarised:

(a) that Bato were not aware of the *gazette* notification and the requirement for them to submit their claim within any particular time limit;

(b) that the compensation paid was grossly inadequate because it did not take into account the significance of the appellants' rights over the land;

(c) that surveys conducted over the land were done in an arbitrary and improper manner; and

(d) that compensation was awarded only for some of their lands and not all of it.

[49] The respondents' short reply to this was that the extinguishment was done in accordance with the law and that adequate compensation had been paid and accepted in that connection. Learned counsel went on to say that the area in question is now part of the completed Bakun dam and thus completely submerged under water. There is no question of it reverting to Bato.

[50] In making the application to have the case proceeded under O 14A, the respondents contended that if the questions of law were answered it would

dispose of the claim brought by the Bato and those questions could be answered without the matter going for full trial. Ultimately, according to the respondents, it would be shown that Bato did not have any proper cause of action against them.

[51] Despite strenuous objection by Bato the learned High Court judge agreed with the respondents and proceeded to consider the case under O 14A. I do not intend to reproduce the entire decision of the learned High Court judge as the same can be found in *Bato Bagi & Ors v Government of the State of Sarawak* [2008] 5 MLJ 547; [2008] 6 CLJ 867. I would however deal with the pertinent and relevant findings of the learned High Court judge.

[52] The learned judge was of the view that the case was suitable for disposal under O 14A without the need for the matter to be ventilated through full trial. The learned judge opined that there were sufficient material facts through the pleadings and affidavits before him to enable him to decide on the question of law.

[53] The High Court appeared to have heavily relied on the dicta of the Court of Appeal in its decision in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337, without examining the facts and circumstances in that case, as authority that even though a particular case involves complex issues, the court should not shun away from O 14A.

[54] In short, the learned judge was of the view that the matter could be disposed of by way of affidavit evidence and proceeded to do the same. The court found in favour of the respondents, to wit, that the impugned sections were not unconstitutional and that the extinguishment of the native customary rights was done in a proper and valid manner.

[55] With respect, I do not think the Court of Appeal in *Petroleum Nasional Bhd* laid down a hard and fast rule for courts to comply with when confronted with applications under O 14A. All the Court of Appeal did was to state the relevant factors which should be considered and which in my view the relevant factors to consider are not exhaustive. Indeed the Court of Appeal was clear when it said this (para 35 of its judgment):

> Clearly, it demonstrates the lack of appreciation of the scope and efficacy of O 14A and O 33 r 2 and the distinction between them. Under the former, the entire cause or matter need not be finally determined. It also permits any claim or issue herein to be so determined, but the question must be purely question of law or construction of document. And the latter caters not only for the question or issue of law arising in a cause or matter to be tried but also of fact or partly of fact and partly of law, and also the entire cause or matter need not be finally determined. … *It is manifestly evident that the court has a wide discretion on the matter*. (Emphasis added.)

But I hasten to add that the discretion must be exercised judicially and in accordance with the law.

[56] On appeal to the Court of Appeal, the decision of the High Court was affirmed. The main plank of its decision is that the High Court was correct in proceeding under O 14A. On the constitutional issue, the Court of Appeal did no more than to wholly stamp its endorsement on the finding of the learned High Court judge. No view of its own was proffered. There was also no discourse on the approach to be taken in construing a constitutional provision. Neither was there any detailed analysis on what the court should look for where there is a constitutional challenge against a piece of legislation or certain specific provisions of its content. The judgment of the Court of Appeal can be found in *Bato Bagi & Ors v Government of the State of Sarawak* [2004] 1 MLJ 8; [2011] 6 CLJ 387.

JALANG'S CASE

[57] Jalang are residents of Rumah Munggu, a longhouse in Tatau, Bintulu Division, Sarawak, and are members of the Iban community and have native customary rights ('NCR') over lands in Ulu Batang Tatau, Tatau, Bintulu Division, Sarawak. It has not been challenged that till today Jalang and their families continue to live on their lands in Ulu Batang Tatau, Tatau, Bintulu, Sarawak.

[58] Similar to *Bato*'s case, Jalang's native customary rights were extinguished vide the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction 1997, pursuant to the impugned sections ('Ulu Batang Extinguishment Direction'). It is also not in doubt that the extinguishment was done for a pulpwood mill to be constructed but to date the pulpwood mill has not been set up and that the land has reverted to jungle.

[59] Jalang brought an action for similar relief as in *Bato*'s case, namely that the impugned sections are unconstitutional vis-a-vis arts 5, 8, 13, and 153 of the FC and art 39 of the SC and that the extinguishment of their native customary rights was void.

[60] As noted above, the High Court recorded the parties' consent that the matter could be dealt with by way of parties tendering agreed facts, agreed issues, bundle of documents and written submissions. The decision of the High Court is reported in *Jalang anak Paran & Ors v Government of the State of Sarawak* [2007] 1 MLJ 412.

[61] After considering the relevant case law on point, the learned High Court judge concluded that impugned sections were not unconstitutional

because the law allows for the extinguishment of native customary rights where clear words are used and that payment of compensation is provided for. The learned High Court judge also found that the construction of a pulpwood mill must be deemed to be for a public purpose and as such the extinguishment was proper.

[62] It may be noted here that the under the impugned sections there is no requirement of public purpose as a reason for the exercise of the power therein. Hence, the reference by the learned High Court judge of public purpose is misplaced. It is not on the same footing as in land acquisition. It is my considered view that s 15A of the Sarawak Land Code ('Code') cannot be read into the impugned sections. Section 15A is limited to instances of post extinguishment, ie with lands which have been 'surrendered, reverted, or resumed' to the government. The extinguishment order in *Jalang*'s case states that:

> On the day of coming into force of this direction, all native customary rights that may be claimed or have subsisted over the land situated at Ulu Batang Tatau, Tatau, and more particularly described in the Schedule below, shall be extinguished and the land held under any such rights shall revert to the Government of Sarawak.

In my opinion, once the land is extinguished and reverted back to the government, only then does s 15A come into application.

[63] Similarly, s 15(1) of the SLC which states that:

> Without prejudice to sections 18 and 18A, where native customary rights have been lawfully created over State land, such land shall not be alienated or be used for a public purpose until all native customary rights have been surrendered or terminated or provision for compensating the persons entitled thereto have been made

does not make 'public purpose' a prerequisite to extinguishment of NCR. It clearly deals with post extinguishment.

[64] Hence, with respect, the learned High Court judge was wrong to 'import' the provisions of s 15A to assert that the NCR could only be extinguished for a public purpose. It must be borne in mind that that is not a pre-requisite for extinguishment. The closest provision to suggest that it may be an essential consideration is s 5(5) of the SLC which states that sub-s 5(3) of the SLC 'shall apply whether the land over which the customary rights are exercised is required for a public purpose or the extinction of such rights is expedient for the purposes of facilitating alienation …'. However, upon a close perusal of the said provision, I am of the view that it cannot be taken as a requirement under the law for the public purpose consideration to be a pre-requisite to extinguishment.

[65] That leaves me with the conclusion that the impugned sections can be invoked to extinguish native customary rights even in cases where it is not strictly speaking for a public purpose. The learned High Court judge in my view erred to find that upon stating the type of the development that is to commence on the land, the law ipso facto deems it to be for a public purpose.

[66] If indeed the public purpose consideration was to be a pre-requisite to extinguishment of native customary rights, it would have been stated within the impugned sections in clear and unambiguous words. In the absence of such clear and unambiguous words, it must be presumed that such consideration is not a pre-requisite for extinguishment.

[67] This is, in my view, extremely regrettable. Its implications are drastic as it would mean that native customary rights may be extinguished for ulterior purposes. This is where the question of the constitutionality of the impugned sections arises. I shall revisit this again below.

[68] In any event, on appeal to the Court of Appeal, the decision of the High Court was affirmed. As in *Bato*'s case, the Court of Appeal in *Jalang*'s case also merely endorsed the finding of the learned High Court judge with emphasis that the impugned sections 'is a valid piece of legislation which is allowable under art 5 of the Federal Constitution, non-discriminatory in nature so as to offend art 8 of the Federal Constitution and in providing for compensation falls within the ambit of art 13 of the Federal Constitution'. Unfortunately, the discussion on the constitutionality issue was minimal. The decision of the Court of Appeal is reported in *Jalang ak Paran & Ors v Government of the State of Sarawak & Anor* [2011] 3 MLJ 13; [2011] 3 CLJ 469.

[69] With due respect, a piece of legislation passed by Parliament or State Assembly may be the will of the majority but it is the court that must be the conscience of the society so as to ensure that the rights and interests of the minority are safeguarded. For what use is there the acclamation: 'All persons are equal before the law and entitled to the equal protection of the law' (art 8 of the FC) when it is illusory. If 'an established right in law exists a citizen has the right to assert it and it is the duty of the courts to aid and assist him in the assertion of his right. The court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that if one citizen has a right under the Constitution there exists a correlative duty on the part of the other citizens to respect that right and not to interfere with it' (see *Educational Company of Ireland Ltd v Fitzpatrick (No 2)* (1961) IR 345 per Budd J at p 368).

[70] Further, the approach adopted by the judges in the courts below when considering the constitutional provisions seemed to be one of 'strict

constructionist', literal, dogmatic and overly reliance on the English philosophy of legal positivism. They took 'the face value, plain view or literal meaning approach to interpretation'. They declined to follow the universally accepted liberal and pragmatic approach (see *Constitutional Interpretation in a Globalised World* by Prof Dr Shad Saleem Faruq (2005) (paper presented at the 13th Malaysian Law Conference, Kuala Lumpur, 16–18 November 2005)). Hence, with such approach in mind they proceeded to consider the constitutionality of the impugned sections.

[71] In my view, when confronted with such issue it is incumbent upon the court to first consider in pragmatic, purposive and liberal fashion the fundamental purpose of the constitutional provision or provisions bearing in mind that it is there not only to safeguard the textual rights 'but also rights that are implicit' therein. The focus should also be rights based and principle based. Having done so the court should then proceed to test objectively whether the impugned sections are within the ambit of those constitutional provision or provisions (see *Tan Tek Seng*). Of course at the same time it must be borne in mind the presumption of constitutionality of an enactment under challenge together with the rule that the court should try to sustain its validity as much as possible (see *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169).

[72] And perhaps some guidance can be derived from these words: 'Our democratic Constitution inhibits blanket and arbitrary deprivation of a person's liberty by authority. It guarantees that no one shall be deprived of his personal liberty except in accordance with procedure established by law. It further permits the state, in the larger interests of the society to so restrict that fundamental right in a reasonable but delicate balance is maintained on a legal fulcrum between individual liberty and social security. The slightest deviation from, or displacement or infraction or violation of the legal procedure symbolised on that fulcrum upsets the balance, introduces error and aberration and vitiates its working. The symbolic balance, therefore, has to be worked out with utmost care and attention' (see *Vedprakash v The State* 1987 AIR Gujarat 253 at para 24 per Gokulakrishnan CJ).

SUBMISSIONS ON BEHALF OF THE APPELLANTS

[73] As alluded to earlier the primary contention on behalf of the appellants is that both *Bato*'s case and *Jalang*'s case were not suitable to be disposed of without going for full trial because facts needed to be elicited by way of oral evidence/testimonies before a proper analysis could be done as to whether the impugned sections have indeed failed or contravened the legislative intention and spirit of arts 5 and 13 of the FC.

[74] According to their learned counsel, there has to be sufficient factual matrix present before the court could answer the said question. Further, it was contended that there should be prior consultation with the appellants before an extinguishment order could be made. If consultation has been done, facts such as the reasons for their attachment to the land (ie burial grounds, farms, etc) would have been uncovered. All these facts when put together would show that the land is part and parcel of their livelihood which is within the meaning and spirit of art 5 of the FC (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 771; [1996] 2 CLJ 771). As the impugned sections are silent on prior consultation, it has to be against the legislative intent of art 5.

[75] Learned counsel for the appellants further argued that consultation prior to extinguishment of native customary rights is of the utmost necessity as opposed acquisition cases (where pre-acquisition hearing is not a requirement, as held by the then Federal Court in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 209; [1982] CLJ (Rep) 314) because of the nature of native customary rights and its implication to the livelihood of the natives.

[76] It was also impressed upon this court that in considering whether the impugned sections contravened art 5 of the FC, reference ought to be made to how foreign jurisdictions have dealt with native rights. Learned counsel urged this court to take into account international norms in relation to this aspect, for instance, as embodied in the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').

[77] Another point submitted for the appellants is the contention that the government stands as a fiduciary to the natives and owes a fiduciary duty to protect the interests of the natives including the protection of their claims on the land which is premised on native customary rights. Learned counsel submitted that this point should be argued upon and a determination be made because based on the way the impugned sections have been relied upon it could very well be that art 5 of the FC has been breached. In this regard, learned counsel argued that as the matters did not go for full trial, the issue of this fiduciary duty and its possible breach could not have been ventilated.

[78] It follows, according to learned counsel for the appellants, that by nature of this fiduciary duty, the government is duty bound to consider the principle that the natives are part and parcel of the land, that they belong to the land and not as a separate entity present on the land. In other words, as far possible, the government is duty bound to ensure that the natives are not separated from the land to which they belong.

[79] Furthermore, learned counsel submitted that native customary rights are not only about monetary compensation. He said that the dimension of native customary rights goes beyond monetary value because it involves the very existence, survival and well being of the natives and their lives. Their way of life is their livelihood and that deserves utmost protection. With the extinguishment of their native customary rights, their livelihood is destroyed and this strikes at the very heart of art 5 of the FC.

[80] Hence, it was contended that all the matters above could not have been dealt with and fully ventilated by the court without the matters going for full trial. In other words, the trial court could not have decided as to whether the impugned sections were unconstitutional without sufficient factual matrix and evidence placed before it which could only have been obtained through oral evidence adduced at a full trial. Learned counsel for the appellants therefore urged this court to remit these appeals back to the High Court for full trials.

[81] Alternatively, learned counsel for the appellants also submitted on the quantum of compensation payable upon the extinguishment of their native customary rights. It was contended that the nature of the long term effect and impact on the natives and their livelihood must be taken into account and not merely considering how much money is their native customary rights valued at.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

[82] On behalf of the respondents, it was argued that all the matters raised by the appellants were not part of their pleaded case. Further, it was also argued that the appellants' approach in dealing with the present appeals was not within the ambit of the leave question.

[83] The respondents also objected to the appellants urging this court to look at international conventions such as the UNDRIP in considering the extent and breath of art 5 of the FC in view of them not being part of municipal law.

[84] The respondents went on to submit that it was not disputed that the appellants had native customary rights. The only remaining issue is whether the native customary rights can be extinguished via the impugned sections.

[85] On the issue of fiduciary duty, it was argued for the respondents that such duty does not arise because that argument is only in relation to alienation of land and not to native customary rights and its extinguishment.

[86] On the need for prior consultation before an extinguishment direction can be issued, the respondents contended that there is no necessity for the same. According to the respondents, there is already a mechanism provided for in the Code upon invoking the impugned sections, for instance, arbitration in the event of being dissatisfied with the quantum of compensation.

[87] It was highlighted by learned counsel for the respondents that compensation had been paid and the matters were even referred to arbitration whereby the amount was increased. In this regard, Jalang contended that they were not part of the group that agreed to the compensation. In reply, the respondents argued that Jalang through their counsel had participated in the arbitration and in fact had the arbitration stayed.

[88] Finally it was argued for the respondents that even where native customary rights have been issued with title deeds, it could still be acquired. As such native customary rights without title should not be put on a better footing with differential treatment.

ISSUES BEFORE THIS COURT

[89] Based on the arguments raised by both sides as summarised above and keeping in mind the sole question posed together with the qualification given, I am of the view that the determinative issues before this court are as follows:

(a) Whether the respective learned High Court judges were correct in disposing of both the matters by way of O 14A or equivalent in order to decide on the constitutionality of the impugned sections; and

(b) If so, whether the question posed should be answered in view of the limited arguments presented.

FINDINGS

[90] First, on the complaint by the respondents that the appellants raised matters outside their pleaded case, I have already addressed the same above.

[91] Simply put, it is the case of the appellants that by failing to allow the matters to go for full trial, a miscarriage of justice had occasioned to the appellants. There was insufficient factual matrix and evidence before the respective High Court to determine and decide on the constitutionality of the impugned sections vis-a-vis arts 5 and 13 of the FC.

[92] Having considered the opposing arguments, I find no reason to disallow the appellants from raising the same. Accordingly, I find there is nothing improper with the appellants' approach to the present appeals.

[93] On the first determinative issue, in respect of *Bato*'s case, as stated earlier, it is quite obvious in the judgment of the Court of Appeal that the main focus was on the appropriateness of the use of O 14A. And although the constitutionality issue was touched upon it was nothing more than merely approving the conclusion of the learned High Court judge. It is therefore still incumbent upon this court, if there is any need, to consider whether the learned High Court judge correctly dealt with the issue, including the approach taken in his interpretation of the relevant articles in FC.

[94] And in respect of *Jalang*'s case in which the parties agreed to the mode of trial adopted at the court of first instance, whether the Court of Appeal was correct in its conclusion particularly on the constitutionality issue.

[95] Having considered the submissions of parties, I am of the view that based on the materials before him, the learned High Court judge in *Bato*'s case vide O 14A procedure was in the position to address the constitutional issue as presented. As such the complaint before the Court of Appeal against the use of O 14A by the learned High Court judge was misplaced. And in *Jalang*'s case it should not arise as the parties agreed to the mode of trial.

[96] Accordingly, having heard the parties before this court, I find no basis to say that the learned High Court judges were wrong in adopting the procedures as they did. All parties were allowed to adduce evidence vide affidavits on their respective versions of the case. And it is settled law that a judge is entitled to make his or her determination on the issue or issues before him or her despite conflicts in the affidavits. More so when there is no allegation of any serious conflict (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400).

[97] Hence, in so far as it relates to complaint on the mode of hearing adopted by the courts of first instance, I find there is no ground for me to interfere. Thus, if these appeals are considered solely on that basis, I am of the view that they should be dismissed.

[98] However, in the course of their judgments the Court of Appeal in both the cases went on to conclude on the constitutionality of the impugned sections, procedural fairness and O 53 of the Rules of the High Court 1980. And this brings me to the second determinative issue.

[99] As stated earlier, it is the approach undertaken by the learned judges in the court of first instance in construing the relevant provisions of the FC vis-a-vis the impugned sections that require close examination.

[100] Unfortunately, this was not the focus in the submissions advanced by

both the appellants and the respondents before this court. The concentration was whether or not the cases should be remitted back to the High Court for want of procedural defect in the use of O 14A or its equivalent. I have already given my view on the issue.

[101] In my view this court has not been fully assisted on this second determinative issue although the question posed was staring at the parties. There was no discussion on whether the courts below were correct in their approaches in construing the relevant provisions of the FC or whether they adopted the right test in considering the constitutionality of the impugned sections in relation to those relevant provisions of the FC.

[102] Meanwhile it may be helpful to bear in mind that 'the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment' (see *Tan Tek Seng*).

[103] If indeed extinguishment of their native customary rights has an adverse effect on the livelihood of the natives in the same way as dismissal has on the livelihood of a gainfully employed person in the public service, then it is only fair in my view that before any extinguishment direction is issued the holders of native customary rights should be given the opportunity to present their case. This is essential justice and procedural fairness which a public decision maker should ensure as having been meted out before and when arriving at his decision (see *Tan Tek Seng*; *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; *Plaintiff M70/ 2011 v Minister for Immigration and Citizenship & Anor* [2011] HCA 32 (31 August 2011)).

[104] An excerpt from a recent article entitled *The 'UNDRIP' and the Malaysian Constitution: Is Special Recognition and Protection of the Orang Asli Customary Lands Permissible?* ([2011] 2 MLJ cxxvi) is quite illuminating on this issue. It states:

> The most relevant provisions of fundamental liberties that would affect any law providing for the protection of orang asli customary land rights are art 5 (particularly, the right to life), art 8 (equality before the law) and art 13 (right to property). These provisions shall be examined in turn and in the light of other relevant constitutional provisions. The separate treatment of these provisions does not suggest that they are to be read in isolation. Articles 5 and 13 are read harmoniously with the fundamental right to equality contained in art 8. Accordingly, art 8 will form the starting point and be considered in the light of arts

5 and 13. In the words of Gopal Sri Ram JCA (as he then was), 'when interpreting other parts of the Constitution, the court must bear in mind the all pervading provision of art 8(1). That article guarantees fairness of all forms of state action'.

[105] And perhaps it is opportune here to be reminded that 'the courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning' (see *Tan Tek Seng*).

[106] Hence, with the limited submissions made before this court while the focus was on the appropriateness of the mode of hearing adopted by the courts of first instance and having reached a conclusion on the issue, I do not think there is a need for me to answer the question posed. To do so would be unfair not only to this court but to the parties as well. I think that such an important issue is best left to another occasion when it is fully ventilated instead of being made just a side issue.

[107] Of course, one may say that in taking such step, I am allowing to stand the conclusions of the courts below on the constitutionality of the impugned sections. That might appear to be so. But the facts and circumstances of these cases should also be taken into account. For instance in *Bato*'s case the compensation money was agreed and accepted by them. They did not go for arbitration. They did not even accept the compensation under protest. Further, the land in question is now under water upon the completion of the Bakun dam. There is no question of returning it to them.

[108] As for *Jalang*'s case, they had gone for arbitration but they had it subsequently stayed. But it is also a fact that substantial number of the former residents of the land in question had accepted the compensation which was later increased by the arbitrator. In my view they are in the same position as in *Bato*'s case. The land has been vacant for some years now.

[109] Hence, on the facts and circumstances of these two cases it serves no purpose to answer the question posed. It may also be noted that a party should not be allowed to approbate and reprobate (see *Verschures Creameries, Limited v Hull and Netherlands Steampship Company, Limited* [1921] 2 KB 608).

[110] Suffice it for me to say here that if anything, the courts below should

have been put on guard as to the adverse effect of the impugned sections to the livelihood and very existence of the natives. By merely looking at the impugned sections, it gives one the impression that it is too vague, too broad, unfettered and untrammelled in that they may be open to abuse. That surely cannot be within the spirit of the fundamental rights embedded in the FC, in particular arts 5, 8 and 13.

[111] There is hardly any guideline or basis upon which extinguishment of native customary rights may be done. The words used are: 'Any native customary rights may be extinguished by direction issued by the minister …' With these words there is nothing to prevent the minister who is answerable to no one, not even to the Sarawak State Assembly or the Tuan Yang Terutama, from issuing directions to extinguish all existing native customary rights in Sarawak. The millions of natives whose livelihood and their future generations depend entirely on the land can be made landless by a stroke of the pen in any event. They may end up as squatters in their own lands where they and their ancestors have been living for generations, preexisting even the impugned sections.

[112] At least in acquisition cases, it is provided for in the relevant Acquisition Act and Enactments the grounds such as public purpose before the exercise of such deprivative power. It is therefore inappropriate in answer to this wide discretion given under the impugned sections to cite the case of *Sagong Tasi*. It should be noted that there is no equivalent of the impugned sections found in the National Land Code.

[113] I have already dealt with the public purpose requirement in extinguishment cases and found that it is not a consideration which is strictly required by the law. This is indeed unfortunate because as I have observed above, the extinguishment procedures may be used for ulterior purposes.

[114] In my view, the impugned sections may just be a general guideline since it is left to the discretion of the Minister. But even if it is a discretion it should not be untrammelled and unfettered of which the courts frown upon. Indeed 'every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene' (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135). In fact, the impugned sections do not prescribe any mechanism on how the Minister should come to his decision in extinguishing native customary rights.

[115] And it has also been said that 'the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in legislation' (see *Nor Anak*

Nyawai). The question is whether the impugned sections can be said to be 'clear and unambiguous' considering their far-reaching effects upon being exercised on the lives of the natives such as being made landless and deprived of their sources of livelihood.

[116] The courts do not treat such provisions with fondness, particularly where fundamental rights involving life, liberty, and property have been adversely affected.

[117] It is essential for the court to understand the true operation of the impugned provisions in order to decide on their constitutionality. In this regard, I take guidance from the decision of the High Court of Australia in *Kartinyeri v The Commonwealth* [1998] HCA 22 where Brennan CJ and McHugh J said at para 7 that 'the operation and effect of a law define its constitutional character', and 'to ascertain the nature of rights, duties, powers and privileges which an Act changes, regulated or abolishes, its application to the circumstances in which it operates must be examined'.

[118] I have also noted an error in the conclusion of the learned High Court judge in *Bato*'s case. Indeed, it has also been accepted as the law that native customary rights pre-existed statutes (see *Superintendent of Lands & Surveys, Bintulu v Nor anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 and *Superintendent of Lands & Surveys, Miri Division v Madeli Salleh* [2007] 6 CLJ 509). And the precept seems to have been recognised by the impugned sections with the use of the words ' … the native customary rights shall be extinguished and the land held under such rights shall revert to the Government' — (s 5(3)).

[119] Yet the learned High Court judge said, inter alia, that the 'property in this case, which is the lands with NCR, is state lands'. If indeed it is state's land in the first place then there is no question of the same reverting to the government upon extinguishment of the native customary rights.

[120] And this brings me to the issue of payment of compensation being one of the redresses stipulated under the impugned sections. Learned counsel for the respondents submitted that this should satisfy the complaint that the extinguishment contravened art 13 of the FC.

[121] With due respect, I am of the view that it might very well be a misdirection made by the courts previously relying on art 13(2) of the FC to assert that adequate compensation must be paid in extinguishment cases. The article stipulates that no law shall provide for the compulsory acquisition or use of property without adequate compensation.

[122] The instant appeals involve extinguishment of native customary rights. There is no principle in law which states that extinguishment is on equal footing as acquisition. This, in my view gives rise to the issue of whether legislation intended at all that native customary rights could be extinguished in the first place! Perhaps this point requires thorough deliberations when the need arises. In any event perhaps the relevant factors relating to the amount of compensation payable could be addressed before the arbitrator.

[123] In considering the quantum of compensation, the relevant authority should not attempt to evaluate native customary rights purely from monetary aspect. All relevant factors must be taken into account such as the natives belong to the land and are part and parcel of it instead of being the owners, their total dependency on the land and its surroundings, and how their daily livelihood depends on the land. These are factual issues. And most importantly, the amount of compensation must be reflective of the long term effect which the extinguishment is going to inflict upon the natives.

[124] In my view, the compensation should not be merely adequate. It should also be sufficient and reasonable based on a long term scale.

[125] As for the argument that the government stands in a fiduciary position to protect the interests of the natives, I am of the view that such a notion has been accepted by our courts (see *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors*). It has also been adopted in foreign jurisdictions (see for instance the Supreme Court of Canada in *Delgamuukw v British Columbia* [1997] 3 SCR 1010). It is therefore not unheard of that the government ought to protect the interests of the natives and stand in a fiduciary position vis-à-vis the natives.

[126] The question in these appeals is therefore whether such duty has been breached. However, this issue is not the main plank of the appellants' submission. And it is not quite related to the question posed.

[127] I would like to make another note on the use of O 53 of the Rules of the High Court 1980 in cases involving native customary rights. This point was touched upon in *Jalang*'s case by the courts below. With respect, I find that it is highly unfair and prejudicial to insist upon the natives to proceed by way of O 53 when they seek to enforce a constitutional right by way of a declaration to that effect.

[128] Although it does, to a certain extent, fall within the realm of public law, I am of the view that it tilts more towards the vindication of a private right which is recognised both under statute and at common law (which pre-existed statute). As such, the natives should be at liberty to proceed by way of an

ordinary civil suit. Another way of looking at it is to consider it as an exception to the *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124 principle.

[129] I therefore prefer to approve the recent decision of the High Court in *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 to that of *Shaharuddin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor* [2005] 2 MLJ 555; [2004] 4 CLJ 775.

[130] In the upshot, these appeals are therefore dismissed on the facts of these cases as discussed above. And for the reasons given as well, I decline to answer the question posed. Having considered the circumstances of the case, I order no costs.

Raus Sharif FCJ:

INTRODUCTION

[131] The only question of law framed by this court for determination in these two appeals is:

> Whether ss 5(3) and (4) of the Sarawak Land Code relating to the extinguishment of native customary rights are ultra vires art 5 of the Federal Constitution read with art 13 of the Federal Constitution.

[132] Sections 5(3) and (4) of the Sarawak Land Code (Sarawak Cap 81) ('Code') deals with the extinguishment of natives customary rights. Articles 5 and 13 of the Federal Constitution set out the constitutional requirements for deprivation of life and property. Article 5 relates to deprivation of life and personal liberty in accordance with the law while art 13 provides that any deprivation of property must be in accordance with the law and such law shall provide for adequate compensation.

BACKGROUND FACTS

[133] The two appeals before us are Civil Appeal No 01–4 of 2011(Q) (*Bato Bagi*) and Civil Appeals No 01–5 of 2011(Q) (*Jalang*).

[134] It is a common ground that in both appeals, the appellants are natives of Sarawak and having native customary rights over the land that they were then residing. In *Bato Bagi*, the appellants were residents of longhouses who are members of the Dayak communities and having native customary rights over land along Batang Balui and its tributaries, in Balaga District, Kapit Division, Sarawak. In *Jalang*, the appellants were residents of Rumah Mungsu, a

longhouse in Tatau, Bintulu Division, Sarawak, and are members of the Iban community and have land in Ulu Batang Tatau, Tatau, Bintulu Division, Sarawak.

[135] It is also a common ground that in both cases, the appellants' native customary rights over the said land were extinguished by the State Government of Sarawak ('the government') acting through the Minister of Resources Planning by way of a direction published in the Sarawak Government *Gazette*.

[136] In *Bato Bagi*, the direction is known as the Land Direction (Extinguishment of Native Customary Rights) (Kawasan Kebanjiran Bakun) (No 26) 1997 published on 17 June 1997. The extinguishment of the NCR was for the purpose of Bakun Hydroelectric Project.

[137] In *Jalang*, the direction is known as Land Direction (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction 1997 published on 13 February 1997. The extinguishment was made for the purpose of a site for a pulpwood mill.

[138] The appellants in *Bato Bagi* were contending that the extinguishment of their native customary rights was void because it violated their fundamental rights under arts 5, 8, 13 and 153 of the Federal Constitution as well as arts 39(1) and 39(2) of the Constitution of the State of Sarawak. In essence, they were asking the court to declare ss 5(3) and 5(4) of the Code (impugned sections) as unconstitutional and that the extinguishment of their native customary rights made thereunder was invalid and void. Alternatively, they prayed for adequate compensation and damages.

[139] The appellants in *Jalang*, inter alia, sought for similar relief as in *Bato Bagi* in that the impugned sections are unconstitutional as it violated arts 5, 8, 13 and 153 of the Federal Constitution and art 39 of the Constitution of the State of Sarawak and that the extinguishment of their native customary rights was void. They were also asking for adequate compensation and damages as the alternative prayer.

[140] In *Bato Bagi*, the case proceeded under O 14A of the Rules of the High Court ('RHC'). The High Court judge was of the view that the case was suitable for disposal under O 14A without the need for the matter to be ventilated through full trial. The High Court judge was of the view that there were sufficient material facts through the pleadings and affidavits before him to enable him to decide on the question of law. After hearing the submission of the parties, the High Court judge found in favour of the government, in that the impugned sections were not unconstitutional and the extinguishment of the native customary rights was done in a proper and valid manner. The

judgment of the High Court can be found in *Bato Bagi & Ors v Government of the State of Sarawak & Anor* [2008] 5 MLJ 547.

[141] The Court of Appeal agreed with the High Court that the case was suitable for determination under O 14A without full trial of the action. The Court of Appeal further held that the challenge to the constitutionality of the impugned sections could be determined by reference to the relevant written laws, including both the State and Federal Constitution, and the numerous authorities on this matter without the need for further evidence. The judgment of the Court of Appeal can be found in *Bato Bagi & Ors v Government of the State of Sarawak & Anor* [2011] 6 CLJ 387.

[142] In *Jalang*'s case, the case also proceeded without recording of oral evidence. The parties agreed that the trial be done based on agreed issues, facts and bundle of documents prepared and submitted by the parties and based on written and oral submissions.

[143] Based on the written and oral submissions, the trial judge had, inter alia, concluded that the impugned sections are not unconstitutional as the law allowed for the extinguishment of native customary rights and payment of compensation is provided for. The judgment of the High Court is found in *Jalang anak Paran & Ors v Government of the State of Sarawak & Anor* [2007] 1 MLJ 412.

[144] The Court of Appeal affirmed the decision of the High Court. The Court of Appeal held 'inter alia' that native customary rights can be extinguished in accordance with the law and with the payment of compensation. There is no law, either constitutional or statutory, which decrees that it could not be terminated or extinguished at all. The judgment of the Court of Appeal is found in *Jalang ak Paran & Ors v Government of the State of Sarawak & Anor* [2011] 3 MLJ 13.

DECISION

Retrial

[145] Tuan Hj Sulaiman, learned counsel for the appellants submitted that the cases are not suitable to be disposed off summarily and without going for full trial because the facts needed to be elicited by way of oral evidence before a decision could be made as to whether the impugned sections have contravened arts 5 and 13 of the Federal Constitution. In his first line of argument, he urged this court not to decide on the point of law posed to us but to send back the two cases for re-trial before the respective High Court judge.

[146] Dato' JC Fong for the government strenuously objected to such proposal. He submitted that the government is not disputing the fact that the appellants had native customary rights. What is being disputed is whether the native customary rights can be extinguished by the impugned sections. He pointed out to us that the High Court and the Court of Appeal in *Jalang* and the High Court in *Bato Bagi* ruled that the impugned sections are not ultra vires the Federal Constitution. He urged this court to decide on this issue, without the necessity of sending it back to the respective High Court for retrial.

[147] It is my considered view that both cases should not be remitted to the respective High Court for full trial, just for the purpose of recording oral evidence. This is particularly so in the case of *Jalang* as it had been agreed between the parties before the High Court that the case should proceed without the need of oral evidence. The trial judge had placed on record as follows:

> [3] When this matter was case managed by this court on 16 January 2006, I asked counsel whether or not it can be tried without the calling of witnesses. On 18 January 2006, after consultation among counsel, they informed me that the concluded and then agreed that the trial of this suit can be done in the following manner:
>
> (a) based on the agreed issues, facts and the bundle of documents prepared and submitted by the parties;
>
> (b) without oral evidence; and
>
> (c) based on written and oral submissions.
>
> [4] Pursuant to aforesaid agreements, counsel tendered their respective submissions (all together nine in numbers) over a period of five months on the mutual consents of counsels. I then fixed 3 July 2005 for oral clarification of counsel respective submissions.

[148] Based on what was recorded by the High Court judge, I do not think it is proper for the appellants in *Jalang*, at this stage to ask for a retrial to enable oral evidence to be recorded. This is especially so when the High Court had made a determination on the agreed issues which is not in the appellants' favour. The findings of the High Court had been affirmed by the Court of Appeal. To allow such retrial is like giving the appellants a second chance. It must not be allowed to happen as it will set a dangerous precedent for future cases.

[149] In *Bato Bagi*, the reasons of them wanting a full trial by way of oral evidence were to enable them an opportunity to raise issues relating to their custom, including their burial grounds, their ways of livelihood etc. They also

wanted to put in their own survey plan to the land as they alleged that the survey was not properly done. They say that they need those facts to prove their claim on the quantum of damages.

[150] With respect, I do not see how by sending back this case for full trial will assist this court in determining the question of law posed before us. It should be noted that the issues relating to the appellants' burial grounds, their way of livelihood, and their own survey plan are relevant only on the issue of compensation. These evidence may be relevant only when they challenge the awards made by the superintendent. This is because the impugned s 5(4) clearly provides that any person, who is not happy with the awards of the superintendent to appeal to an arbitrator. It is before the arbitration proceedings that the appellants need to produce such evidence to support their claim for compensation.

[151] Further, it should be noted that in *Bato Bagi*, the constitutional issues were neither raised as a ground in the memorandum of appeal nor canvassed and argued before the Court of Appeal. Thus, the Court of Appeal cannot be faulted or blamed for not deciding on the constitutional issues. And, the appellants cannot now use the absence of the Court of Appeal's decision on the constitutional issues, as a ground to have the case be remitted to the High Court for retrial.

[152] In the final analysis, the sole issue of law before us is whether the impugned sections are ultra vires arts 5 and 13 of the Federal Constitution. In this respect, I find that there are sufficient material facts through the pleadings and affidavits before this court to enable the court to decide on the question posed.

[153] Thus, it is my view that there is no necessity for the two cases to be remitted to the respective High Court for full trial. The sole question of law posed to us can be answered without the necessity of having further evidence be adduced. I will now address the question posed to this court.

Are the impugned sections ultra vires art 5 of the Federal Constitution read with art 13 of the Constitution

[154] Before going any further, it is convenient that the impugned sections to be reproduced:

5 (3) (a) Any native customary rights may be extinguished by direction issued by the Minister which shall be:—

(i) Published in the Gazette and one newspaper circulating in Sarawak; and

(ii) Exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished is sitate; and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to Government:

provided that where such rights are extinguished in pursuance to this section compensation shall be paid to any person who can established his claims to such rights in accordance with paragraphs (b) and (c); or other land which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

(b) Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the Superintendent, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the Minister under paragraph (a), provided that the period so stipulated shall not be less than sixty days from the date of publication or exhibition thereof.

(c) No claim for compensation for extinguishment of native customary rights shall be entertained by the Superintendent unless such claim is submitted within the period stipulated in paragraph (b).

(4) (a) Any person who is dissatisfied with any decision made by the Superintendent under sub section (2) on the ground that —

(i) his claim to native customary rights has been rejected or not recognised by the Superintendent;

(ii) the amount or apportioned of compensation is inadequate, unfair or unreasonable, may within twenty one days from the date of receipt of the decision of the Superintendent by which in writing addressed to the Superintendent require the matter to be referred to arbitration accordance with section 212.

(b) Upon receipt of the notice of arbitration, the Superintendent shall direct that any compensation payable to the person who desires to have his claim or matter referred to arbitration, to be deposited in the High Court, pending the outcome of such arbitration proceedings.

[155] It is the submission of Tuan Hj Sulaiman bin Abdullah that the impugned sections contravene art 5(1) and art 13(2) of the Federal Constitution and thus, it should be struck down as being unconstitutional. His attack on the impugned sections is basically that the impugned sections do not conform with art 5 read together with art 13 of the Federal Constitution. This is because the word 'adequate' is not deployed before the word 'compensation' in sub-s 3. Further the impugned sections or any part of the Code do not set out any criteria or rules for the assessment of compensation for the extinguishment of native customary rights to enable the government to determine what is 'adequate compensation' for a native being deprived of his native customary

rights. Thus, he argued that the impugned sections fall short of the requirement of art 13(2) of the Federal Constitution.

[156] The learned counsel for the appellants further submitted that native customary rights is not merely a proprietary right to be equated with the right to owner of an alienated land, but amounts to a right to life and comes under the protection of art 5 of the Federal Constitution. He submitted that on the basis of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 that it should be interpreted broadly ie that life would include all those facts that are an integral part of life itself and those matters which go to form the quality of life, including the right of livelihood.

[157] He further attacks on the impugned sections is that, it does not provide the provision for prior consultation with the appellants before the extinguishment order could be made. According to him, if consultation had been done, facts will show that the said land is part and parcel of the appellants' livelihood which is within the meaning and spirit of art 5 of the Federal Constitution. The absence of prior consultation in the section is contrary to the intention of art 5 of the Federal Constitution. In this respect, the learned counsel urged us to distance ourselves from the case of *S Kulasingam & Anor v Commission of Lands, Federal Territory & Ors* [1982] 1 MLJ 204; [1982] CLJ (Rep) 314 ('*Kulasingam*'), because of the native customary rights and its implication to the livelihood of the natives.

[158] It is further contended by learned counsel that in considering whether the impugned sections is in contravention of art 5 of the Federal Constitution, reference ought to be made to how foreign jurisdiction have dealt with native rights. He urged this court to take into account international norms in relation to this aspect, for instance as embodied in the United Nation Declaration of the Right of Indigenous People ('UNDRIP'). It is pointed out that the government stands as a fiduciary to the natives and owes a fiduciary duty to protect the interest of the natives including the protection of their claims on the land which is premised on native customary rights.

[159] Dato' JC Fong, for the government countered each and every issue raised by the appellants. He contended that the impugned section does not violate arts 5 and 13(2) of the Federal Constitution or even the State Constitution. This is because it provides for payment of compensation. He pointed out that compensation had been paid and the matters were even referred to arbitration whereby the amount was increased.

[160] On the issue of prior consultation before an extinguishment of the native customary rights, he contended that there is no necessity for the same as there is already a mechanism provided for in the Code, in that, an aggrieved

person can refer the matter for arbitration in the event of being dissatisfied with the question of compensation. He also submitted that the Federal Court case of *Kulasingam* is still a good law, and also applicable to native customary rights. He pointed to us that even where native customary rights have been issued with title deed it could still be acquired. As such native customary rights without title should not be put a better position with differential treatment.

[161] On the issue of international convention he urged this court not to place much emphasize on it when considering arts 5 and 13 of the Federal Constitution in view of the fact that the UNDRIP are not part of municipal law.

[162] After reading the respective judgments of the courts below, it is clear that the issue as to whether the impugned sections has violated arts 5 and 13 of the Federal Constitution had been dealt with. The High Court judge and the Court of Appeal in *Jalang* and the High Court in *Bato Bagi* were unanimous in their findings in that the impugned sections does not violate arts 5 and 13 of the Federal Constitution. They have given their reasons and I fully agree with their decisions and reasonings.

[163] Abdul Aziz Abdul Rahim J in *Bato Bagi* in dealing with the issue held as follows:

> It is crystal clear from reading s 5(3) of the Code that the customary rights may be extinguished provided that compensation or alternative replacement land with the same rights is made available to any person whose NCR are affected by the direction. Therefore the Code permits the extinguishment of NCR are affected by the direction. Therefore the Code permits the extinguishment of NCR with provision for compensation. Article 13(1) of the Constitution provide that no person shall be deprived of property save in accordance with the law. The law that would apply in this case would be the Code in particular s 5(3) and (4) of the Code which given the extinguishment of the NCR.

[164] Abdul Aziz Abdul Rahim J further stated that:

> Article 13(2) of the Constitution uses the expression 'adequate compensation' whereas the proviso to 5(3) of the Code uses simple expression 'compensation'. However, this in itself cannot make the provision unconstitutional.

[165] I fully agree with Abdul Aziz Abdul Rahim J and that by itself disposed the first issue raised by the appellants. The absence of the word 'adequate' in the impugned sections cannot be used to struck it down for being unconstitutional.

[166] It must be noted that the impugned s 5(3) contains a mandatory

provision for payment of compensation. And s 5(4) institutionalised an impartial process, via arbitration before an independent arbitrator, to ensure that the compensation paid is adequate if a native is dissatisfied with the compensation awarded by the superintendent. Section 5(3)(b) of the Code set out clearly how a claim for compensation may be made, viz:

(a) to be submitted to the superintendent;

(b) in a form prescribed by the superintendent;

(c) within the period stipulated in the direction made by the Minister; and

(d) the claim to be supported by evidence.

[167] Clearly s 5(3)(b) enables a native to produce evidence to support his claim for compensation. This means he could show by evidence, what he considered to be the monetary, tangible and other values of the rights which the government seeks to extinguish. It is only in respect of this issue, that the meaning of the native customary rights should be interpreted broadly to include life. The superintendent in awarding compensation to the native must consider the rights to life which must include all these facts such as the reason for his attachment to the land such as burial grounds, farms etc which affect his rights to livelihood. But, it is only relevant to the issue of compensation and not as a ground to declare the impugned sections unconstitutional.

[168] It was argued on behalf of the appellants that the impugned sections are unconstitutional as they do not provide any criteria as to how compensation should be calculated, bearing in mind that the native customary rights comprise not only of the plaintiffs' property but also their livelihood. David Wong J in *Jalang* answered the issue in the following manner:

> The fact that there are no criteria provided for in the impugned sections actually favours the plaintiffs in that the plaintiffs at the arbitration hearing for compensation are not hindered from putting forth what they consider relevant criteria in assessing the compensation.

[169] I am in complete agreement with David Wong J. It is up to the appellants to furnish evidence in support of the quantum of compensation that they are claiming. They can claim on the basis of loss of livelihood, agricultural produce of crop, loss of right of way or burial sites, etc. In *Jalang*, the arbitrator in assessing the compensation for 50 objectors, taking into account the objectors need the land for livelihood held:

> The best approach to assessment is to use the compensation method of monthly loss of income by Mokhtar Sidin (JCA) in *Adong*'s case. That would be in multiple of 20 years (not 25 years as in *Adong*'s case) and worked as follows:
>
> RM300 x 12 x 20 years = RM72,000

X 50 objection families = RM3,600,000.

[170] Thus, there is no basis to allege that the impugned sections are unconstitutional on the basis of lack of criteria in calculating the amount of compensation.

[171] Another strong argument put forward by the appellants is the absence of prior consultation with the appellants before the extinguishment of their native customary rights. It was argued that appellants relied on their land for a livelihood or survival and thus, this court should construe art 13(2) of the Federal Constitution in a manner that it includes the requirement of pre-acquisition hearing or consultation. On this issue, I only have to refer to this court's decision in *Kulasingam*. In *Kulasingam*, one of the issues decided was whether there was a right of a pre-acquisition hearing in a land acquisition case. Abdoolcader J (as he then was) speaking for the Federal Court held that there was 'nothing in the legislation imposing any obligation for a pre-acquisition hearing in marked contrast to the specific provisions for and inquiry and hearing in respect of the quantum of compensation payable'.

[172] No doubt the above ruling was in relation to acquisition under the Land Acquisition Act 1960, the same principle should apply in these present appeals. Under the Code, there is no provision for pre-extinguishment hearing. The Code only provides provisions for hearing in respect of quantum of compensation payable. Since the Code imposed no obligation to inform the appellants that their lands would be extinguished or to invite them to make representation to the government, it cannot be said the government had acted in contravention of art 13(2) of the Federal Constitution.

[173] I agree that prior consultation with the appellants before the extinguishment of their native customary rights is perhap a right thing to do by the government. But, it is not a legal requirement. The failure of the government to do so, does not make the act of extinguishment of the native customary rights unconstitutional. I therefore cannot accept the argument advanced on this issue.

[174] It was argued by the appellants that persons with title or alienated land are accorded greater safeguards by the provisions of the law, whereas natives who claim native customary rights are deprived of even the basic safeguard to the provisions governing in the extinguishment of native customary rights. And the government is given the unfettered discretion in dealing with their rights. With respect, I disagree. Looking at the scheme of the Code, it is not

true that the Code does not provide safeguards with regard to the extinguishment of native customary rights. I only need to refer to s 15A of the Code which reads:

> 154
>
> (1) Subject to the direction of the Minister and the provision of Part III, the Director may —
>
> (a) Alienate any land which had been reverted to the Government pursuant to s 5(3) and (5), or
>
> (b) Re-alienate any alienated land which has been surrendered to or resumed by the Government under Part IV, for any of the purposes specified in s 46
>
> To any person, corporation or body of persons approved by the Minister.
>
> (2) Whenever any land referred to in subsection (1) is alienated or re-alienated, as the case may be, such land shall not at any time be used for any purpose other than the development or undertaking which in the opinion of the Minister is for the benefit of the State or any part thereof or of the public generally or any class of the public.

[175] Clearly, the extinguishment of the native customary rights must be for public purpose. It means that any person aggrieved by the extinguishment of his native customary rights, may challenge to declare such extinguishment as null and void on the ground that it is not for public purpose. This issue was in fact addressed by David Wong J in *Jalang*:

> So the only reason for the extinguishment must be for the benefit of the state or a public purpose. It is not disputed by counsel on both sides that there is no specific provision requiring the first defendant to disclose the purpose of extinguishment which in my view is understandable as there can be only one purpose for extinguishment which is public purpose. Be that as it may, one can and should imply from the above sections that the minister is under a duty to disclose the reason of the extinguishment and failure to do so would be a breach of a statutory duty on the part of the minister.

[176] David Wong J further said:

> In the present case, the minister in the direction did refer to the use of a 'Pulpwood Mill Site at Ulu Batang Tatau' and in my view the minister had by the aforesaid reference complied with his statutory duty to disclose. There is no necessity to state that the 'Pulpwood Mill Site is for a public purpose as law deem it to be so. Whether or not the intended purpose is a public purpose subject to challenge in the courts by the plaintiffs'.

[177] However, it was pointed out by David Wong J, that in order for the appellants to challenge the extinguishment, they must put some evidence of

bad faith or abuse of power on the part of the minister. But in this case, they have not done so. David Wong J even went on to say:

> On the facts before me, I cannot say that there has been such an abuse. It is undisputed that the pulp and paper project ('project') was spearhead by STIDC, a statutory body of Sarawak with the requisite expertise provided by Asia Pulp and Paper Ltd. Had the project succeeded it would have created ample employment opportunities for Sarawak enhance its economy and reduced the country depending on imported papers. These factors are valid consideration in forming an opinion whether or not the project was a public purpose project.

[178] The Court of Appeal had affirmed the reasoning of David Wong J. I have no reason to disagree. The Minister's discretion in issuing the direction to extinguish the native customary rights is not absolute. The extinguishment of the native customary rights must be for public purpose. Any extinguishment which is not for public purpose is open for challenge and may be struck down by the court on the ground of mala fide or abuse of power.

[179] However, both in *Bato Bagi* and *Jalang*, the issue of mala fide or abuse of power on the part of the government is a non–issue. It was not raised in the courts below as well as before this court. Nevertheless, on the facts especially in *Bato Bagi*, it is clear that the extinguishment was for public purpose, where the native customary rights was extinguished for the purpose of Bakun hydroelectric project.

[180] On the issue whether this court should use 'international norms' embodied in the UNDRIP to interpret arts 5 and 13 of the Federal Constitution I have only this to say. International treaties do not form part of our law, unless those provisions have been incorporated into our law. We should not use international norms as a guide to interpret our Federal Constitution. Regarding the issue of determining the constitutionality of a statue, Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 at p 17 had this to say:

> So, in determining the constitutionally or otherwise of a statue under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) said: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.'

[181] I share the same view. Thus, I hold that the impugned sections do not violate arts 5 and 13 of the Federal Constitution. In coming to the above conclusion, I am always guided by the principle that when the court is face with the issue of constitutionality of a provision of a statue, the court should be slow

in striking down the impugned provision for being unconstitutional. In this respect, I wish to repeat the words of Jeevan Reddy J in *State of Bihor @ Ors v Bihar Distillery Ltd* AIR 1997 SC 1511, which as quoted by Gopal Sri Ram JCA (as he then was) in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169 which reads:

> The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain.

[182] Obviously in these appeals, for the reasons given, I cannot hold that the impugned sections are impossible to sustain. Under the circumstances, I would answer the questions posed in the negative. I rule that s 5(3) and (4) of the Sarawak Land Code relating to the extinguishment of native customary rights are not ultra vires art 5 read with art 13 of the Federal Constitution. The appeals are therefore dismissed. The orders of the courts below are affirmed.

Appeals dismissed with no order as to costs.

Reported by M Sivabarathi